

1. **KAUR (Migration) [2017] AATA 389 (9 March 2017)**

2.

3.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms GAGANDEEP KAUR

CASE NUMBER: 1516336

DIBP REFERENCE(S): BCC2015/1555663

MEMBER: Miriam Holmes

DATE: 9 March 2017

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Skilled Regional Sponsored (Provisional) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 489 - Skilled - Regional (Provisional) visa:

- Public Interest Criterion 4020 for the purposes of cl.489.211 of Schedule 2 to the Regulations.

Statement made on 09 March 2017 at 3:41pm

CATCHWORDS

Migration – Skilled Regional Sponsored (Provisional) visa – Subclass 489 – Bogus documents/misleading information – IT Engineer – Work references – Department verification – Inconsistent information – No evidence of bogus document/misleading information

LEGISLATION

Migration Act 1958, ss 65, 359AA

Migration Regulations 1994, Schedule 2, Schedule 4, cl 489.211, Public Interest Criterion 4020

CASES

Sharma v MIMAC [2013] FCCA 1280

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 November 2015 to refuse to grant the applicant a Skilled Regional Sponsored (Provisional) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 31 May 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.489.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that the applicant met the requirement in Public Interest Criterion 4020. In effect, the delegate was not satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1).
6. The applicant appeared before the Tribunal on 8 March 2017 to give evidence and present arguments.
7. The applicant was represented in relation to the review by her registered migration agent, Mr Chug.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.489.211 for the grant of the visa.
10. **Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**
11. PIC 4020 has a number of aspects, and in this case the critical requirement is whether the Tribunal is satisfied that the applicant meets the requirement in PIC 4020(1). In essence, the Tribunal must be satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1). A copy of PIC 4020 is attached.
12. The requirements in cl.4020(1) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4).
13. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5). It states –
 14. "In this clause:
 15. information that is **false or misleading in a material particular** means information that is:
 16. (a) false or misleading at the time it is given; and

17. (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

18. ...”

19. The term ‘bogus document’ is defined in s.5 of the Act (see the attachment to this decision). It states –

‘bogus document’ in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

20. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

21. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

22. The Tribunal notes that the meaning of ‘evidence’ in the context of PIC 4020(1) was expressly considered in *Sharma v MIMAC* [2013] FCCA 1280, in which the Court stated that the word ‘evidence’ is used to impose a requirement that whatever facts are conveyed by the material relied upon to establish, that information given in connection with the application for a visa was false or misleading in a material particular, they must be facts that are sufficiently probative to lead to that conclusion.

23. In this case, the delegate was not satisfied that PIC 4020(1) was met because of verification checks undertaken by a Department officer regarding the applicant’s work references which stated that the applicant had work experience as an IT Engineer at MRG Auto Pvt Ltd. In essence, the issue for the Tribunal is whether it is satisfied that there is no evidence that the applicant gave or caused to be given to a Department officer false or misleading information in a material particular or a bogus document in relation to the visa application, when she provided to the Department the following documents in support of her visa application:

- work reference letters by Ms K Kaur and Mr Singh regarding working at MRG Auto Pvt Ltd as an IT Engineers; or
- a skills assessment which was based on the same work reference letters.

24. The Tribunal has considered the matter afresh and has set out its analysis of the evidence below.

25. The Tribunal finds based on the delegate’s decision (provided by the applicant to the Tribunal), the documents provided by the applicant to the Department and the applicant’s oral evidence as follows:

- On 31 May 2015 the applicant made an application for a Skilled Regional Sponsored (Provisional) visa. This application was made under the First Provisional Visa stream.

- In the visa application the applicant stated that she had worked as an IT Engineer at MRG Auto Pvt Ltd between 10 April 2005 and 10 July 2011.
 - On 31 May 2015 the applicant provided to the Department the following documentation in support of her visa application:
 - An affidavit dated 17 April 2015 by Mr Jasbir Singh, Service Manager at MRG Auto Pvt. Ltd. Pioneer Hyundai. The affidavit stated that the applicant had worked as an IT Engineer from April 2005 to July 2011 working full time at MRG Auto Pvt. Ltd. and listed her duties and responsibilities as an IT Engineer.
 - A letter dated 14 July 2014 by Ms K Kaur, Customer Care Manager and HR, at MRG Auto Pvt. Ltd. Pioneer Hyundai. This letter stated that the applicant had worked full time as an IT Engineer from April 2005 to July 2011 at MRG Auto Pvt. Ltd. and listed her duties and responsibilities as an IT Engineer. The list of duties was identical to the list in the affidavit of Mr Singh.
 - A skills assessment dated 5 September 2014 by the Australian Computer Society. This skills assessment was based on the Diploma of Information Technology from Victoria University and the work reference letters from Mr Singh and Ms K Kaur (described above).
26. At the hearing, the applicant explained that she finished school in India in 2005. Thereafter, she then went and studied several computer courses in India. These courses included networking courses, MCSE and CCNE, which were six months courses. She is currently studying a Bachelor degree in information technology in Australia which she is due to complete in June 2017.
27. At the hearing the applicant provided the following information regarding her employment at MRG Auto Pvt Ltd.
28. She worked in India as the IT Manager at MRG Auto Pvt Ltd for six years. She started in 2005 as a “fresher” (a first year) with less pay and she worked with the Senior IT Manager. She stated that she secured the job as her father had a contact with an executive at MRG Auto Pvt Ltd. She also provided job references related to her practical experience with computers. She had undertaken computer courses and so she was given the employment opportunity. After 1 year at MRG Auto Pvt Ltd she was fully trained in the company’s computer systems. She stated that the business had 25 – 30 employees and there were 10 – 15 computers in the front service area and 10 computers in the back area of the business. She stated that her role involved maintaining the computer network, undertaking upgrades and replacements, configuring IT, monitoring and enhancing the IT security systems, ensuring back up arrangements and keeping records in relation to the network and computers. The applicant explained that part of the software that was operated by the company, was an international program (GDMS) that had to be maintained as part of the business operations, as it was part of the Hyundai system. She also had a role training new employees to the business in the computer systems and she also trained staff to replace her, as she was planning to leave the company. The applicant’s supervisor was Mr Singh.
29. The applicant stated that she obtained the affidavit from Mr Singh and the reference letter from Ms K Kaur after ringing them and asking for the documents. She then emailed them and they sent the documents to her by return email. The Tribunal asked the applicant why the affidavit by Mr Singh and the letter from Ms K Kaur included an identical list of duties. The applicant stated that she did not know where they got the list of duties from; she said Mr Singh and Ms K Kaur may have discussed it. The applicant stated that she had never seen

previously the list of duties for the position listed in the affidavit and letter. She suggested that they probably checked her file to see what she did.

30. On 18 September 2015 the Department conducted verification checks of the work reference letters from Mr Singh and Ms K Kaur. A department officer contacted by telephone Mr Singh, Ms K Kaur and Mr P Sharma (owner of MRG Auto Pvt Ltd).
31. In summary, the department officer gathered the following information from the verification checks:
 - The officer spoke by telephone with Mr Singh. Mr Singh stated that he was the Service Manager at MRG Auto Pvt Ltd. He was requested to provide details of the HR personnel at MRG Auto Pvt Ltd and he stated that the applicant was working as HR and he repeated this statement. He confirmed that he had prepared a reference letter for the applicant and he stated that Ms K Kaur was a Customer Care Manager who had no other department responsibilities. He stated that there were only one or two computers at MRG Auto Pvt Ltd. When he was asked if the applicant also handled computers he stated that she used to take care of HR and computers and that the applicant used to make contract letters on the computers. When he was requested to provide details of the duties of the applicant he stated that the applicant used to give appointment letter and take job interviews.
 - The officer spoke by telephone with Ms K Kaur. Ms K Kaur confirmed she was a customer care manager and responsible for HR at MRG Auto Pvt Ltd. She stated that she used to handle HR and still handles HR. She confirmed she knew the applicant who used to work in the EDP department. She stated that the applicant used to make data entries in the software known as GDMS in Hyundai. She had no comment to make in response to the officer's statements that Mr Singh had said that the applicant used to work as HR personnel.
 - The officer spoke by telephone with Mr Pardeep Sharma. He confirmed that he was the owner and general manager of MRG Auto Pvt Ltd. When asked to provide details of the HR personnel at MRG Auto Pvt Ltd, he stated that he himself used to handle all the hiring, however he was assisted by the applicant. When asked to detail the duties of the applicant he responded that she used to assist him in HR and computers. He went on to state that the applicant used to work to assist him in making contract documents and other IT related problems, e.g. system is slow or emails are not working and she used to take care of the businesses' 25 computers, installing software and other basic things. He also stated that she performed data entries in the GDMS software.
32. Prior to the hearing, the Tribunal released to the applicant the notes made by the Department officer of the verification checks.
33. In accordance with the procedure under s359AA of the Act, the Tribunal invited the applicant to comment on the verification check information. In response, the applicant stated that there might have been confusion in relation to the number of computers in the business. She stated that they used to deal with 1200 customers per month, so they could not have operated with only 2 or 3 computers. They were servicing faulty cars and they needed computers to maintain the records of the car servicing and needed more than 2 or 3 computers for this purpose. She stated that when giving the number of computers Mr Singh may have been referring to the number of computers in the applicant's work area. The applicant stated that in her work area they had several computers because they were working on GDMS which was the main software program which had its own server and was

connected globally to obtain information regarding the car and was a system they inputted data to. In addition, they had another server for the MRG Auto Pvt Ltd business network.

34. In relation to the information obtained during the verification checks regarding her undertaking HR duties, the applicant stated that maybe Mr Singh was not expecting the call and he got confused and there may have been confusion in the call. The applicant acknowledged that she did undertake some HR duties. She explained that the business operated out of two branches. Ms K Kaur was in charge of HR and she undertook the HR duties at the first branch, where Ms K Kaur worked. There was no specific HR person at the second branch where the applicant worked. The applicant stated that her main duty was as the IT Manager, but whenever Mr Sharma required assistance with HR matters then she would provide him with the assistance. For example, she stated that Mr Sharma interviewed people but he did not have time to prepare the employment contract and Ms K Kaur was not available, so she would assist with this from time to time. She stated that she would undertake HR duties once or twice a week but most of her time was spent working on the computer network and computers. She also commented that the department delegate has focussed on the negative things that were said by the referees and not the positive things, where they did state that she undertook computer duties.
35. The Tribunal also took into consideration the information provided by the applicant from Mr Sharma, Mr Singh and Ms K Kaur since the verification checks. It is evident that the applicant has been very concerned about the department's concerns about the genuineness of her work reference letters and she has obtained several letters from the managers at her former employers at MRG Auto Pvt Ltd. In April 2016 and February 2017 the Tribunal received from the applicant letters from Mr Sharma, Mr Singh and Ms K Kaur. In essence, these letters restate that the applicant worked for MRG Auto Pvt Ltd primarily in the role of IT Engineer, although she did do some HR duties. They also state that they told the department officer that the applicant undertook the compute related duties.
36. The Tribunal notes that the delegate has referred to the applicant providing information in relation to the verification checks on 14 October 2015. However, this documentation from the applicant was not provided by the Department to the Tribunal.
37. The Tribunal understands why the delegate formed the conclusion that the applicant did not meet the requirement in PIC 4020. However, on balance, after carefully reviewing the information set out in the notes of the verification checks, and the oral evidence of the applicant and the subsequent letters from Mr Sharma, Ms K Kaur and Mr Singh the Tribunal is satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made.
38. The Tribunal considered the applicant a reliable witness, who set out the details of her work at MRG Auto Pvt Ltd, her relevant qualifications, how she obtained the employment and the attempts she has made to obtain further information from Mr Singh, Mr Sharma and Ms K Kaur verifying her work as an IT Engineer.
39. The Tribunal also looked carefully at the notes of the verification check. The Tribunal placed greater weight on the comments of Mr Sharma, who was the owner of the business and had not provided a work reference letter in relation to the visa application. As noted in the verification check notes, he stated that the applicant's duties were to assist him in HR and computers. He described her duties were to assist him in making contract documents and other IT related problems, e.g. system is slow, or emails are not working, she also performed data entries in GDMS software. He also stated that the business has 25 computers and the

applicant used to take care of them, installing software and other basic things. Mr Sharma described that he was responsible for HR and was assisted by the applicant. The duties of the applicant in relation to the computers that Mr Sharma described are consistent with being an IT Engineer and consistent with the duties described in the work reference letters by Mr Singh and Ms K Kaur provided in support of the visa application. It appears the delegate placed little weight on these statements by Mr Sharma. However, the Tribunal considered that greater weight should be placed on Mr Sharma's statements regarding the applicant's duties in respect of the computers – as he was the business owner, he did not have any previous involvement in the visa application (e.g. providing work references) and therefore considered his response a reliable account of the applicant's duties whilst working at MRG Auto Pvt Ltd. The Tribunal acknowledges that Mr Sharma made no reference to Ms K Kaur's duties in HR – but the Tribunal did not consider this significant.

40. The Tribunal considered the notes regarding the verification check with Ms Kaur and notes the statements by Ms K Kaur that the applicant was responsible for the data entries for GDMS. This duty is a computer related task (and not an HR duty). Ms Kaur did not mention any other duties for the applicant and it appears the officer did not explore with Ms K Kaur whether the applicant performed any other duties, including any computer related duties, but only explored Mr Singh's comments about HR duties. The Tribunal did not place significant weight on the notes of this verification check, other than she confirmed the applicant did work related to the GDMS system.
41. The Tribunal considered the notes regarding the verification check with Mr Singh. The Tribunal is mindful that Mr Singh was the applicant's manager at MRG Auto Pvt Ltd. The verification records note that Mr Singh clearly states that the applicant was working as HR, although the Tribunal notes this answer was given in response to a question asking Mr Singh to provide details of the HR personnel at MRG Auto Pvt Ltd. He also stated that the applicant used to take care of HR and computers. The Tribunal accepts the officer asked Mr Singh what the applicant's duties were and Mr Singh referred to appointment letters and taking job interviews. On reviewing the notes, the Tribunal placed less weight on the comments of Mr Singh. The Tribunal placed less weight on his responses as on reviewing the verification notes he appeared to have answered the Department's officer questions in the context of the first question asked of him – which was about the HR personnel. The Tribunal formed the view that Mr Singh then provided responses in the context of the duties of the applicant in her role as undertaking HR duties, and it was not explicitly raised with him what, if any, duties the applicant had in relation to the "handling" of computers. Further, Mr Singh stated that there were only one or two computers at MRG Auto Pvt Ltd, this is inconsistent with the information from Mr Sharma and the applicant and the Tribunal considered this unlikely and not a reliable answer by Mr Singh, and it was more likely he was referring to the computers in his or the applicant's work area. The Tribunal was also troubled that Mr Singh stated in a letter dated 23 March 2016 that he made clear during the telephone interview that that the applicant's role was IT Engineer and that was her main role. The Tribunal notes that the department officer made no record of these statements and considered it highly unlikely that an officer would omit such statements from the verification records, particularly when the officer made detailed records of Mr Sharma's statements about the applicant's computer related duties. Overall the Tribunal placed limited weight on the statements by Mr Singh both during the verification check and thereafter.
42. Further, the Tribunal placed weight on the further information provided by Mr Sharma and Ms K Kaur in their letters supplied to the Tribunal in April 2016 and February 2017.
43. The Tribunal considered the analysis by the delegate regarding the skills assessment, however the Tribunal did not find this reasoning logical or persuasive. It is apparent that the applicant only had work experience prior to July 2014 at MRG Auto Pvt. Ltd and the assessing authority relied on the work reference letters in relation to that experience.

44. After weighing all the evidence available, the Tribunal is not satisfied there is sufficiently probative evidence that the work reference letters by Ms K Kaur and Mr Singh provided with the visa application contain false or misleading statements or information.
45. Therefore, on the evidence available, the Tribunal is satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made.
46. Therefore, on the evidence available, the Tribunal is satisfied that the applicant meets the requirement in PIC4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

47. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
48. There is no evidence before the Tribunal that the applicant or any member of the family unit has previously been refused a visa because of a failure to satisfy PIC 4020(1) in the relevant period. Therefore, on the evidence available, the Tribunal is satisfied that cl.4020(2) is met.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

49. Clause 4020(2A) requires an applicant satisfy the Tribunal as to her identity. The Tribunal had regard to the copy of the applicant's passport page on file and is satisfied as to the applicant's identity. Therefore, the applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

50. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA). There is no evidence on file to indicate that the applicant or any member of the family unit has been refused a visa due to a failure to meet identity requirements. Therefore cl.4020(2B) is met.
51. On the basis of the above, the Tribunal is satisfied that the applicant does satisfy PIC 4020 for the purposes of cl.489.211.

DECISION

52. The Tribunal remits the application for a Skilled Regional Sponsored (Provisional) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 489 - Skilled - Regional (Provisional) visa:
 - Public Interest Criterion 4020 for the purposes of cl.489.211 of Schedule 2 to the Regulations.

Miriam Holmes
Senior Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...